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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 JOHN RUIZ,

7 Plaintiff,

8 v.

9 NEVADA DEPARTMENT OF
10 CORRECTIONS, *et al.*,

11 Defendants.

Case No. 2:18-CV-00091-RBF-EJY

ORDER

Defendants' Motion to Dismiss (ECF No. 29)

12 **I. INTRODUCTION**

13 Before the Court is Defendants David Carpenter and Tara Carpenter's Motion to Dismiss
14 (ECF No. 12) Plaintiff's First Amended Complaint. ECF No. 29.

15 **II. BACKGROUND**

16 On January 16, 2018, Plaintiff, who is a prisoner in the custody of the Nevada Department
17 of Corrections ("NDOC") initiated this action. ECF No. 1. On May 16, 2018, this Court issued a
18 screening order that dismissed Plaintiff's complaint without prejudice for failure to adequately
19 state a claim. ECF No. 8. Plaintiff filed the operative Amended Complaint on August 23, 2018
20 alleging more specific allegations under 42 U.S.C. § 1983, including those at issue in the instant
21 motion. ECF No. 12. This Order incorporates by reference the factual background described in the
22 screening order on amended complaint's "Section III." ECF No. 13 at 4-9.

23 In relevant part, the screening order of the Amended Complaint allowed Plaintiff to
24 proceed on the following four claims against the defendants associated with this Motion to
25 Dismiss:

- 26 (1) One claim of failure to protect against D. Carpenter,
27 (2) One First Amendment retaliation claim against D. Carpenter, LeGrand, Bryne, Garcia,
28 and T. Carpenter.

- 1 (3) One claim of a due process violation in disciplinary hearings against D. Carpenter; and
 2 (4) One Eighth Amendment claim of deliberate indifference to serious medical needs
 3 against Scott.

4 ECF No. 13 at 15-16.

5 On October 28, 2019, Defendants T. Carpenter and D. Carpenter filed their Motion to
 6 Dismiss Plaintiff's First Amended Complaint. ECF No. 29. Responses were due by November 11,
 7 2019, but nothing was filed on or before that date. On February 21, 2020, Defendant Dr. John Scott
 8 filed a Joinder to the Motion to Dismiss. ECF No. 56. On March 4, 2020, Defendants Robert
 9 LeGrand, Quentin Bryne, and Adrian Garcia each filed a Joinder to the Motion to Dismiss. ECF
 10 Nos. 57, 58, & 59. On April 28, 2020, Plaintiff filed his response to Defendants' Motion to
 11 Dismiss. ECF No. 70. On May 4, 2020, Defendants responded to Plaintiff's response. ECF No.
 12 72.

13 **III. LEGAL STANDARD**

14 **A. Motion to Dismiss**

15 An initial pleading must contain "a short and plain statement of the claim showing that the
 16 pleader is entitled to relief." Fed. R. Civ. P. 8(a). The court may dismiss a complaint for failing to
 17 state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a motion to
 18 dismiss, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and
 19 are construed in the light most favorable to the non-moving party." Faulkner v. ADT Sec. Servs.,
 20 Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted).

21 To survive a motion to dismiss, a complaint need not contain "detailed factual allegations,"
 22 but it must do more than assert "labels and conclusions" or "a formulaic recitation of the elements
 23 of a cause of action...." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp.
 24 v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it contains
 25 "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,"
 26 meaning that the court can reasonably infer "that the defendant is liable for the misconduct
 27 alleged." Id. at 678 (internal quotation and citation omitted). The Ninth Circuit, in elaborating on
 28 the pleading standard described in Twombly and Iqbal, has held that for a complaint to survive

dismissal, the plaintiff must allege non-conclusory facts that, together with reasonable inferences from those facts, are “plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

IV. DISCUSSION

A. Statute of Limitations of Plaintiff’s Claims

1. Legal Standard

“The statute of limitations applicable to an action pursuant to 42 U.S.C. § 1983 is the personal injury statute of limitations of the state in which the cause of action arose.” Alameda Books, Inc. v. City of Los Angeles, 631 F.3d 1031, 1041 (9th Cir. 2011). The applicable Nevada statute of limitations, N.R.S. § 11.190(4)(e), establishes a 2-year statute of limitations for personal injury caused by the wrongful acts or negligence of another. See Rosales-Martinez v. Palmer, 753 F.3d 890, 895 (9th Cir. 2014) (citing N.R.S. § 11.190(4)(e)). The statute of limitations period accrues when a party “knows or has reason to know of the injury.” Golden Gate Hotel Ass’n v. City and Cty. of San Francisco, 18 F.3d 1482, 1486 (9th Cir. 1994).

Defendants generally argue that, since the last alleged unconstitutional conduct by Defendants took place on May 14, 2015 (and earlier for most Defendants), and none of the events took place within the two years prior to the filing of First Amended Complaint on August 23, 2018 (or even the initiation of the action on January 16, 2018), Plaintiff’s claims are time barred under Nevada’s statute of limitations. ECF No. 29 at 57-59. Defendants further claim that the Plaintiff failed to oppose the statute of limitations argument in his reply, and so concedes that argument. ECF No. 72 at 2-3.

Plaintiff’s response did not specifically address the statute of limitations issue raised by Defendants. ECF No. 70. Plaintiff does state, though, that he responded to the violations soon after they happened by filing inmate grievances. For example, he writes, “Plaintiff....did in fact immediately attempt to submit many inmate grievances against the defendants at Lovelock Correctional Center, during the times of the incidents there.” Id. at 2. Plaintiff alleges his numerous grievances were either ignored and denied, and after some of the Defendants verbally mocked him

1 and had him transferred to High Desert State Prison on September 9, 2015, Plaintiff told him that
 2 he would file two 42 U.S.C. § 1983 lawsuits against them. Id. at 45. One of lawsuits is this instant
 3 case, and another of which is Case No. 2:16-cv-00931-APG-VCF¹. Id. The Court interprets this
 4 as Plaintiff claiming that the statute of limitations should be tolled because Plaintiff sought to
 5 respond diligently after the incidents and seek remedies, but that Defendants delayed him.

6 **2. Failure to Protect Claim Against D. Carpenter**

7 Plaintiff states that Defendant D. Carpenter knew Defendant Fredericks had sexual
 8 contact with Plaintiff but failed to report the abuse or take any action to prevent it. ECF No. 12 at
 9 9-10, ECF No. 13 at 10. The facts surrounding the failure to protect claim against D. Carpenter
 10 occurred around early 2011. Id. Plaintiff claims that on February 9, 2011, D. Carpenter conspired
 11 with other defendants to falsely accuse Plaintiff of compromising staff with a “charge of MJ51”
 12 threatened Plaintiff to take a deal to cover up for Defendant Fredericks, and knew Defendant
 13 Fredericks had sexual contact with Plaintiff. ECF No. 12 at 9; ECF No. 13 at 6.

14 The applicable Nevada statute of limitations for Plaintiffs' claims is two years. N.R.S. §
 15 11.190(4)(e). This complaint was filed in 2018, and the facts surrounding this claim are from 2011,
 16 Therefore, Plaintiff’s failure to protect claim is time barred.

17 **3. First Amendment Retaliation Claim against D. Carpenter, LeGrand,** 18 **Bryne, Garcia, and T. Carpenter**

19 Plaintiff alleges that on May 17, 2011, he was transferred to a maximum-security facility
 20 in retaliation for exercising his First Amendment right to file prison grievances. ECF No. 12 at 13;
 21 ECF No. 13 at 7, 11. On March 4, 2020, LeGrand, Bryne, and Garcia each filed a joinder to
 22 Defendants T. Carpenter and D. Carpenter’s Motion to Dismiss, stating that their alleged conduct
 23 on May 17, 2011 falls outside of the statute of limitations.

24 With respect to T. Carpenter, the facts around the retaliation against her are from April 18,
 25 2011 (ECF No. 13 at 7), May 17, 2011 (Id.), May 16, 2013 (Id. at 9), and May 14, 2015 (Id. at 7,
 26 9) in which T. Carpenter allegedly directed the transfer of Plaintiff to Ely State Prison, a maximum

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 28 ¹ This case does not raise the same claims at issue in this case. Plaintiff could have raised
 the claims in the current case in the 2016 action he filed but he did not.

1 security facility.

2 The applicable Nevada statute of limitations for Plaintiff's retaliation claim is two
3 years. N.R.S. § 11.190(4)(e). Therefore, the statute of limitations on this claim expired on May 17,
4 2013 for Defendants D. Carpenter, LeGrand, Bryne, and Garcia. As for T. Carpenter, the statute
5 of limitations expired May 14, 2017. Plaintiff did not file his complaint until 2018. Therefore,
6 Plaintiff's First Amendment retaliation claim is time barred against all Defendants.

7 **4. Due Process Claim in Disciplinary Hearings against D. Carpenter**

8 Plaintiff alleges that on February 9, 2011, Defendants D. Carpenter and Simms conspired
9 to deny his request to call Defendant Fredericks to be present as a witness at Plaintiff's disciplinary
10 hearing on March 9, 2011. ECF No. 12 at 10, ECF No. 13 at 6.

11 The applicable Nevada statute of limitations for Plaintiff's claims is two years. N.R.S. §
12 11.190(4)(e). Therefore, the statute of limitations on this claim expired on February 9, 2013.
13 Plaintiff did not file his complaint until 2018. Therefore, Plaintiff's Due Process claim is time
14 barred.

15 **5. Eighth Amendment Claim of Deliberate Indifference to Serious Medical** 16 **Needs against Scott**

17 Plaintiff alleges that on April 18, 2011, Dr. Scott performed a physical examination of
18 Plaintiff and then around that time, Dr. Scott refused to provide medical treatment for Plaintiff's
19 sexually transmitted disease. ECF No. 12 at 12, ECF No. 13 at 7. On February 21, 2020, Scott
20 filed a joinder to Defendants T. Carpenter and D. Carpenter's Motion to Dismiss, stating that his
21 alleged conduct on April 18, 2011 falls outside of the statute of limitations. ECF No. 56.

22 The applicable Nevada statute of limitations for Plaintiff's deliberate indifference claim is
23 two years. N.R.S. § 11.190(4)(e). Therefore, the statute of limitations on this claim expired on
24 April 18, 2013. Plaintiff did not file his complaint until 2018. Therefore, Plaintiff's Eighth
25 Amendment claim is time barred.

26 **6. Equitable Tolling**

27 **a. Legal Standard**

28 State law governs the application of tolling doctrines when not inconsistent with federal

1 law. See Hardin v. Straub, 490 U.S. 536, 537-39 (1989). However, “federal law determines when
 2 a cause of action accrues and the statute of limitations begins to run for a [Section]
 3 1983 claim.” Rosales-Martinez, 753 F.3d at 895. Ordinarily, the claim accrues “when the plaintiff
 4 knows or has reason to know of the injury which is the basis of the action.” Id. The Nevada
 5 Supreme Court adopted the Ninth Circuit’s rule that “...if a reasonable plaintiff would not have
 6 known of the existence of a possible claim within the limitations period, then equitable tolling will
 7 serve to extend the statute of limitations for filing suit until the plaintiff can gather what
 8 information he needs.” See, e.g., City of N. Las Vegas v. State Local. Gov’t Bd., 127 Nev. 631,
 9 639-40 (Nev. 2011) (quoting Lukovsky v. City and County of San Francisco, 535 F.3d 1044, 1051
 10 (9th Cir. 2008)).

11 **b. Analysis**

12 Plaintiff suggests in his reply to the Motion to Dismiss that his claims should be equitably
 13 tolled because he diligently filed prison grievances soon after the incidents happened. ECF No. 70
 14 at 2. In his reply, Plaintiff submits several inmate grievances dated 2011 to 2016, several of which
 15 contain claims against Defendants. ECF No. 70 at 47-112. These filed grievances indicate that
 16 Plaintiff knew or had reason to know about his injuries. The facts around the claims against the
 17 defendants who filed the Motion to Dismiss or Joinder mostly occurred in 2011. The facts around
 18 the retaliation claim against T. Carpenter occurred predominantly in early 2011, with one event in
 19 2013 and another in 2015. ECF No. 13 at 5-6, 7-9. Plaintiff did not file his Complaint within the
 20 two-year statute of limitations for any of these incidents. Plaintiff’s grievances are not a substitute
 21 for the filing of federal action. Moreover, Plaintiff did file a federal lawsuit (Case No. 2:16-cv-
 22 00931-APG-VCF) prior to this one which could have included some of the claims at issue in this
 23 case. He chose not to do so. The Court declines therefore to find that equitable tolling should toll
 24 the statute of limitations as Plaintiff had knowledge of the alleged conduct and access to the
 25 necessary information to bring his claims well before he filed his initial complaint in January 2018.
 26 Therefore, the Court holds that Plaintiff’s claims against the Defendants bringing the instant
 27 motion are time-barred.
 28

1 **V. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (ECF No. 29) is
3 GRANTED. The claims against Defendants David Carpenter, Tara Carpenter, Dr. John Scott,
4 Robert LeGrand, Quentin Bryne, and Adrian Garcia are dismissed.

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6 DATED: October 26th, 2020

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10 **RICHARD F. BOULWARE, II**
11 **UNITED STATES DISTRICT JUDGE**
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